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Supreme Court, U.S.
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No. 02 -

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE),
Respondent.

On Appeal to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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33 pp

Questions Presented

1. Whether this Court will set aside a judgment that is clearly demonstrated to be an abuse of discretion ?

2. Whether members of the Judicial Branch can freely disregard the laws and Constitution of the United States ?

3. Whether the legislature's amendment of 28 U.S.C. § 1254 in 1988, eliminating the right of direct appeal to this Court, is invalid and unconstitutional ?

4. Whether it is the policy of the Judicial Branch to revoke the Constitutional rights of those who sue the United States Department of Energy (" DOE ") ?

Parties Proceeding

Petitioner was plaintiff (01-0399 JP/LCS) and subsequently Appellant to the U.S. CoA for the 10th Cir. (02-2117). Respondent Abraham (henceforth "Defendant"); 10th Cir. Judges Henry, Briscoe, and Murphy (henceforth "Respondents").

Respondents are judges who dismissed the case above. Respondents' contact information is: The Circuit Executive, U.S. 10th Cir., Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257. (303) 844 - 3157

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Rules

Supreme Court ("Sup.Ct.") Rules 10(a), 10(c), 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The U.S. CoA for the 10th Cir. denied Petitioner's appeal (02-2117) with an Order filed on FEB 5, 2003.

Constitutional Provisions at Issue

First Amendment Right of Free Speech
Fifth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case involves retaliations taken upon Petitioner by his former employer, the United States Department of Energy ("DOE"). Petitioner is a disabled individual who was employed with the DOE as an Environmental Scientist at the Waste Isolation Pilot Plant ("WIPP") in Southeastern New Mexico. The WIPP is a controversial nuclear waste repository for the disposal of defense program generated transuranic waste. Petitioner is an honest man who takes seriously his professional and moral obligations to protect people and the environment.

When Petitioner began identifying safety deficiencies at WIPP, the DOE engaged in reprisals towards Petitioner. The retaliations against Petitioner culminated in his removal from federal service on 12/10/97 for putative "poor performance". Since his removal, the DOE has blacklisted, harassed, and intimidated Petitioner.

Petitioner filed a complaint in the U.S. District Court, District of New Mexico concerning the DOE's post-employment retaliations, Case no. 01-0399 JP/LCS. In dismissing this case, the district court abused its discretion by suppressing evidence, while allowing no discovery of "relevant" evidence ruled by the Magistrate. The district court also defied the doctrine of *stare decisis* without a hint of justification for doing so. An appeal was filed with the U.S. CoA for the 10th Cir.. The 10th Cir. has affirmed the dismissal of Petitioner's case while failing to recognize or address his pleadings. Petitioner has no wish to be criticizing the Government for whom he was very proud to work for previously. E.g.: Defense Logistics Agency - 5 years.

Argument

Question 1. The district court denied the attempt of Petitioner to file and establish relevant and probative evidence into the record of this case to defend against summary judgment. Said evidence was categorized by the district court as "premature", and Defendant claimed that this evidence would be "cluttering the record." See App.4 at 14, 15 Fed.R.Evid. 201(f) notes that:

> "Judicial notice [of adjudicative facts] may be taken at any stage of the proceeding."

Classification of the adjudicative facts that Petitioner had attempted to introduce as "premature" by the district court was without any doubt an error of law. This Court has ruled that:

> "A district court, by definition, abuses its discretion when it makes an error of law." See *Koon*, 518 U.S. at 100

In addition, the district court denied Petitioner's motion (doc. 20) to file his evidence the very next day after the date of Defendant's response. Petitioner had his motion dismissed several days before he even received the response of Defendant. The district court local rules require that Petitioner had fourteen (14) days to file his reply to Defendant's response. Besides making an error of law and abusing its discretion, the district court also violated Petitioner's due process rights. This Court has also ruled that a "district court's refusal to admit the proffered . . . evidence was a clear abuse of discretion." See *Beech Aircraft Corp.*,

488 U.S. at 172. There are additional abuses of discretion that Petitioner will detail below, but he prays that this Court will apply the following ruling towards this instant Petition:

> "Our duty is to . . . uphold the lawful authority of the court without deviation, and yet without hesitancy, where there has been an abuse of discretion, to correct it in the completest way."

See *B&O RR Co.*, 225 U.S. at 325. Petitioner again prays that this Court will apply the ruling above towards this case "without hesitancy" so that he may find justice done.

Petitioner filed the evidence above in response to Defendant's Motion for Summary Judgment ("MfSJ") as the district court had ordered that he could do (doc. 23). Petitioner's evidence consisted of eleven tabbed exhibits totaling 239 pages. The district court and Respondents both refused to consider this evidence that Petitioner specifically linked to his Memorandum in Opposition to the MfSJ. Petitioner had detailed specific averments of retaliations of Defendant including blacklisting (*Cf.* App.4 at 8) and violations of Equal Employment Opportunity ("EEO") law. Defendant failed to deny these specific averments. The silence of Defendant constitutes an adoptive admission per Fed.R.Evid. 801(d)(2)(B). See *Andrus*, 775 F.2d at 839-40. In dismissing Petitioner's appeal, Respondents abused their discretion by failing to evaluate this case "in light of the record viewed in its entirety." See *Cooter & Gell*, 496 U.S. at 400.

Respondents claimed that: "Title VII preempts constitutional claims by federal employees regarding retaliatory discrimination." See page A-4 Petitioner had presented evidence of fact and law clearly detailing that the claim of Respondents above does not apply to his case. E.g.: "when the immunity of a federal entity has been waived, an aggrieved federal employee may sue with a "constitutional tort claim" . . . See *Federal Deposit Insurance Corp.*, 510 U.S. at 472." See App.4 at 11. Respondents have made another error of law in abuse of their discretion.

Next, Respondents claim that Petitioner had failed to explain "why additional discovery was necessary." See page A-6. This is another error of law because the Magistrate had granted Petitioner's "Request for Production Number 4" noting that the request is "relevant to his claims." See page A-18. Respondents have again abused their discretion by dismissing Petitioner's appeal while "facts essential" to his opposition to summary judgment were being withheld by Defendant. See Fed.R.Civ.P. 56(f).

Petitioner had filed a Request for Admissions ("RfA") of the Authenticity of Evidence to defend against the MfSJ. Defendant failed to respond to this RfA "within 30 days after service of the request." See Fed.R.Civ.P. 36 Respondents, again, abused their discretion by claiming that the RfA was untimely. The facts concerning the RfA had been specifically detailed to Respondents. See App.4 at 14, 15. This is another example of how Respondents have ignored the pleadings of Petitioner in a "clearly erroneous assessment of the evidence." See *Cooter & Gell*, 496 U.S. at 405.

Respondents made additional "clearly erroneous" assessments of fact and law concerning

the claims of Petitioner. For example, Respondents state that the discrimination claims of Petitioner must constitute an "adverse employment action" (A-3). This is not consistent with EEO law that Petitioner had noted to include: "allegations of "retaliation" which "are considered to be complaints of discrimination . . ." See 29 CFR 1614.103(a)." App.4 at 9, 10. Allegations of harassment telephone calls and blacklisting in a close temporal link to the protected activity of Petitioner do constitute a claim of "retaliation". Additionally, Respondents also claimed that Petitioner's EEO claims consisted of only mere poor processing of his complaint. This is another "clearly erroneous assessment of the evidence". Defendant had refused to investigate legitimate allegations of retaliation and had improperly dismissed a portion of Petitioner's EEO complaint, among other serious admitted violations. This rises substantially higher than mere poor processing of a complaint. See *Id* Defendant has admitted to refusing to afford Petitioner equal protection of EEO law in violation of his Fifth Amendment constitutional right.

Question 2. Within the body of Petitioner's Opening Brief ("OB") to his appeal to Respondents (02-2117), Petitioner had specifically detailed how the district court had rendered the following laws null and void: 1) 44 USC 1507; 2) 29 CFR 1614.105(g); 3) 29 CFR 1614.103(a); 4) 29 CFR 1614.302(a)(1); 5) 5 CFR 1201.3(b); 6) 5 CFR 1209.4(b); 7) Solid Waste Disposal Act ("SWDA"), 42 USC 6901 et seq.; 8) 1st, 5th, 7th Constitutional Amendment rights. Respondents have stated:

> "We agree with the district court's analysis. Accordingly, we affirm the entry of summary judgment in favor of the Department for substantially the same reasons set forth in the memorandum opinion and order entered by the district court on March 21, 2002." See page A-5

Consequently, Respondents have also rendered the laws above null and void in clear excess of their authority. This Court has ruled:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. *Elliott v. Peirsol,* 1 Pet. 328, 340; *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8." (quoting *Vallely,* 254 U.S. at 353-54)

Courts have the authority to determine what the law is, and to apply that law. Only the legislature has the power to alter the law; not the courts.

Respondents have exceeded their authority by rendering the law noted above null and void. An example of this is 29 CFR 1614.302 which involves the rights of disabled persons, such as Petitioner, to file "mixed" complaints of discrimination. These "mixed" complaints can include allegations of a "substantial and specific danger to public health" such as what the environmental statutes cover.

The district court and Respondents claim that complaints under the environmental statutes can only be filed with the United States Department of Labor. The district court and Respondents are wrong. They do not have the authority to dispose of law enacted to protect the rights of disabled persons. See App.4 at 8, 9 Respondents have refused to afford Petitioner equal protection of EEO law, and have violated his Fifth Amendment rights. Respondents and the district court have violated their Article VI Oath to "support" the "Constitution". Is not the supervisory power of this Court designed to ensure that the Constitution is supported ? This Court has ruled that: "the supervisory power serves the "twofold" purpose of deterring illegality and protecting judicial integrity." See *Payner*, 447 U.S. 735 n.8; See also *Hasting*, 461 U.S. at 526. Petitioner prays that the Article VI Oath referred to above will be powerfully affirmed by this Court.

Question 3. The Legislature has amended Article III, Section 2 and Article VI of the Constitution, by removing the appellate jurisdiction of this Court from 28 U.S.C. § 1254 via the 1988 Public Law 100-352. Article III, Section 2 requires:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the U.S., .."
> "In all Cases, affecting Ambassadors, . . ., and those in which a State shall be a party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction."

The Legislature's removal of this Court's appellate jurisdiction from Section 1254 has actually amended Article III of the Constitution itself. This "amendment" of the Constitution is invalid for several reasons. First of all is the mechanism by which the Constitution was amended. The U.S. Constitution can NOT be amended by a Public Law. An Amendment can only take place by either a two thirds vote of both houses of Congress, or by a national constitutional convention called by Congress on petition by two thirds of the states. Neither of these two actions took place in the enactment of Pub. L. 100-352.

The second reason that this "amendment" is invalid is because it is not a formal Amendment of the Constitution. Formal Amendments of the Constitution are the only mechanism by which substantial constitutional rights of American citizens may be effected. This has always been so, that is, until 1988 (Pub. L. 100-352).

Elimination of this Court's appellate jurisdiction, from Section 1254, has also caused Petitioner to suffer "direct injury as the result of its enforcement." See *Commonwealth of Mass.*, 262 U.S. at 488. Appendix 6 of this instant Petition is an outline of the admitted constitutional violations and damages inflicted upon Petitioner by the same Defendant concerning Petition No. 01-1143.

> "A federal constitutional issue was properly presented, it was within our appellate jurisdiction . . ., and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction."

See *Hicks* , 422 U.S. at 344.

Disappearance of the appellate jurisdiction from this Court is unconstitutional for several reasons. First, it violates Article VI by giving Justices of this Court a choice of supporting the Constitution for some litigants, and NOT supporting the Constitution for other litigants. This means that Pub. L. 100-352 has amended the Article VI Oath to always support the Constitution nugatory. Due to the unconstitutional act of the Legislature (Pub.L. 100-352), Petitioner has already suffered constitutional freedom *deminutio* concerning Petition No. 01-1143 with this Court. Petitioner has shown that Pub. L. 100-352 is invalid, and that he has also suffered direct injury as a result of this law to invoke the Power of judicial review. See *Commonwealth of Mass.*, 262 U.S. at 488.

Question 4. During the course of the proceedings leading up to Petition No. 01-1143, Petitioner has suffered the same kind of injustices from the Judicial Branch as detailed within Questions 1 and 2 above. This mistreatment, which began back in 1999, includes:

1) Improper suppression of evidence.
2) Misleading Petitioner as to the admissibility of evidence.
3) Exclusion of relevant evidence filed.
4) Violation of Constitutional rights.
5) Ignoring facts and law within pleadings.
6) Defying the doctrine of *stare decisis* without a hint of justification.

A clear trend has been demonstrated, since 1999 to present, by the Judicial Branch without deviation.

There is little doubt that this Court sets the policy of how law is to be interpreted and practiced by the other federal courts within the Judicial Branch. The injustices that Petitioner has been suffering with for so long have been very specifically pointed out to this Court. These facts certainly warrant corrective supervisory action by this Court.

Prayer for Relief

Due to all of the above, Petitioner prays that this Court grant this instant Petition to review this case on its merits. Also, that judicial review be conducted of the validity and constitutionality of Public Law 100-352.

Respectfully submitted,

s/Tod N. Rockefeller
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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff-Appellant,

v. No. 02-2117

SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE), *
Defendant-Appellee.

D.C. No. CIV-01-399-JP
(D.New Mexico)

ORDER AND JUDGMENT

Before HENRY, BRISCOE, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeal. See Fed.R.App.P 34 (a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Tod N. Rockefeller, proceeding *pro se*, appeals the district court's order granting summary judgement in favor of his former employer, the United States Department of Energy (Department), on each of the claims in his complaint. Our

* This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

jurisdiction arises under 28 U.S.C. § 1291. We affirm.

Rockefeller was employed by the Department as an environmental specialist. The Department terminated Rockefeller in December 1997 for poor performance. In his complaint in this case,[1] Rockefeller asserted four claims against the Department. First, he claimed the Department violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, by retaliating against him for making public comments about alleged safety violations at the Department. According to Rockefeller, employees of the Department retaliated against him by making harassing phone calls to his home and by blacklisting him from other employment opportunities with the federal government. Second, Rockefeller claimed the Department violated the whistle-blower provisions of the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SWDA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), by blacklisting him from other federal employment opportunities. Third, Rockefeller claimed the Department failed to process his underlying equal employment opportunity complaint in accordance

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1 In a prior case, Rockefeller alleged that the Department wrongfully terminated him because he was disabled and in retaliation for engaging in protected Title VII and whistle-blowing activities. The district court entered summary judgment in favor of the Department, and we affirmed in *Rockefeller v. Abraham*, Nos. 01-2054 & 00-2480, 2001 WL 1434623 (10th Cir. Nov. 15, 2001)(unpublished), *cert. denied*, 535 U.S. 932 (2002).

with the governing federal regulations, see 29 C.F.R. § 1614.101, *et seq.* Fourth, Rockefeller claimed the Department violated his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

The district court concluded that the Department was entitled to summary judgment on each of Rockefeller's claims. With respect to his Title VII retaliation claim, the district court granted summary judgment because: (1) Rockefeller failed to set forth any specific evidence linking the Department to the alleged phone calls or blacklisting; and (2) even if the Department could be linked to the phone calls, the calls did not rise to the level of an adverse employment action since the callers never identified themselves or said anything about Rockefeller's activities vis-a-vis the Department. To support the latter determination, the district court relied on our decision in *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178-79 (10th Cir. 1999) (holding that harassing phone calls did not constitute adverse employment action where callers did not identify themselves or mention plaintiff's EEOC claim and where plaintiff presented no evidence that calls were placed by any of defendant's employees with decision-making authority or that management condoned activity).

With respect to Rockefeller's claims under the whistle-blower provisions of TSCA, SWDA, and CERCLA, the district court determined that the Department was entitled to summary judgment because Rockefeller was required under each Act to first exhaust his administrative remedies with the Secretary of Labor, and Rockefeller conceded during oral argument before the district court that he had never filed an administrative complaint

addressing his present whistle-blower claims. In order to provide Rockefeller with an opportunity to exhaust his administrative remedies, the district court dismissed the whistle-blower claims without prejudice.

With respect to Rockefeller's claim that the Department failed to process his administrative complaint in accordance with the governing federal regulations, the district court determined that the Department was entitled to summary judgment because "a violation of a federal regulation governing the handling of [Rockefeller's] EEOC complaint does not create an independent cause of action under Title VII." R., Doc. 58 at 4. To support this determination, the district court relied on our decision in *Scheerer v. Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991) (holding that there is no private cause of action against Equal Employment Opportunity Commission for misprocessing of discrimination claims asserted against private employer), and the Seventh Circuit's decision in *Jordan v. Summers*, 205 F.3d 337, 342 (7th Cir. 2000) (holding that federal employee could not assert claim under Title VII against equal employment opportunity division of the federal agency that employed her for misprocessing of discrimination and retaliation claims).

Finally, with respect to his claimed constitutional violations, the district court determined that the Department was entitled to summary judgment because: (1) Title VII preempts constitutional claims by federal employees regarding retaliatory discrimination; (2) to the extent Rockefeller was alleging due process violations aside from discrimination, he failed to demonstrate that a genuine issue of material fact

was in dispute; and (3) to the extent Rockefeller was alleging a First Amendment retaliation claim based on his public comments about potential safety violations at the Department, the claim was preempted by the federal whistle-blower statutes. However, because it concluded that his First Amendment claims are closely related to his statutory whistle-blower claims, the court dismissed the First Amendment claims without prejudice.

"We review a district court order granting summary judgment de novo." *Camfield v. City of Okla. City*, 248 F.3d 1214, 1224 (10th Cir. 2001). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and **admissions on file**, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Camfield*, 248 F.3d at 1224 (quotation omitted). Because he is appearing pro se, we also interpret Rockefeller's pleadings generously. *Belhomme v. Widnall*, 127 F.3d 1214, 1216 (10th Cir. 1997).

We agree with the district court's analysis. Accordingly, we affirm the entry of summary judgment in favor of the Department for substantially the same reasons set forth in the memorandum opinion and order entered by the district court on March 21, 2002. In addition, we reject Rockefeller's claim that the district court erred in granting summary judgment without permitting him to engage in additional discovery. Under Fed.R.Civ.P. 56(f), Rockefeller was required

to file an affidavit in response to the Department's motion for summary judgment explaining to the district court why additional discovery was necessary before the court could rule on the motion. See *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783-84 (10th Cir. 2000). While Rockefeller referred to Rule 56(f) in his opposition to the Department's motion for summary judgment, see R., Doc. 38 at 1, he failed to file an affidavit in compliance with Rule 56(f), and he failed to explain to the district court why additional discovery was necessary. Moreover, Rockefeller had almost five months to conduct discovery under the district court's pretrial schedule, and, except for serving four requests for production of documents, he conducted no discovery.[2]

---

2 On March 20, 2002, one day before the district judge entered his order granting the Department's summary judgment motion, the magistrate judge granted a motion to compel filed by Rockefeller and directed the Department to produce certain phone records. See R., Doc. 55. Apparently, the magistrate judge granted Rockefeller's motion to compel because certain phone numbers he provided to the court matched phone numbers called by an employee of the Department during the relevant time periods. See id. At 2. However, even if the phone calls were in fact made by an employee of the Department, Rockefeller failed to allege sufficient facts to establish that the calls construed an adverse employment action. As a result, the district judge's entry of summary judgment was proper, regardless of the magistrate judge's ruling on Rockefeller's motion to compel. Further, Rockefeller's claim that the Department admitted certain matters by not responding to requests for admission he served on it in February 2002 is without merit since the discovery cut-off was in January 2002.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

Entered for the Court
Robert H. Henry
Chief Judge

FILED
United States Court of Appeals
Tenth Circuit
FEB 5 2003
PATRICK FISHER
Clerk

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRONMENTAL SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE, Doc. 59
UNITED STATES
DEPARTMENT OF ENERGY,
Plaintiff,

v. Civ. No. 01-399
JP/LCS - ACE

SPENCER ABRAHAM, in
his official capacity as
SECRETARY, UNITED STATES
DEPARTMENT OF ENERGY,
Defendant.

FINAL SUMMARY JUDGMENT

Having granted summary judgment to Defendant Spencer Abraham, in his official capacity as Secretary of the United States Department of Energy, by a Memorandum Opinion and Order entered contemporaneously with this final summary judgment.

IT IS HEREBY ORDERED that final summary judgment is entered in favor of Defendant Spencer Abraham, in his official capacity as Secretary of the United States Department of Energy, on all claims asserted in Plaintiff's Original Complaint; and Plaintiff's claims under the whistle-blower provisions of the Safe Drinking Water Act, the Toxic Substances Control Act, and the

Comprehensive Environmental Response, Compensation, and Liability Act, and Plaintiff's associated First Amendment claims are dismissed without prejudice; and all of Plaintiff's other claims are dismissed with prejudice.

s/James A. Parker

CHIEF UNITED STATES DISTRICT JUDGE

FILED
United States District Court
Albuquerque, New Mexico
MARCH 21, 2002
ROBERT M. MARCH
Clerk

FILED Contemporaneously
Document 58
MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRONMENTAL SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
UNITED STATES
DEPARTMENT OF ENERGY,
Plaintiff,

v.

SPENCER ABRAHAM, in
his official capacity as
SECRETARY, UNITED STATES
DEPARTMENT OF ENERGY,
Defendant.

Doc. 58

Civ. No. 01-399
JP/LCS - ACE

MEMORANDUM OPINION AND ORDER

On January 17, 2002, Defendant filed a motion for summary judgment (Doc. No. 35). Defendant's motion for summary judgment seeks to dismiss Plaintiff's Original Complaint (Doc. No. 1), which includes allegations of (1) retaliation in violation of Title VII, (2) violations of the whistle-blower provisions of the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SDWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), (3) violations of the federal regulations concerning the manner in which equal employment opportunity complaints are handled, and (4) violations of the United State's constitution. On March 19, 2002, after the parties had fully briefed the motion, the Court heard oral argument. Having considered the arguments, the facts, and the law, the Court will grant summary judgment on Plaintiff's Original

Complaint.

Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that a genuine issue of material fact exists. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The non-moving party may not avoid summary judgment by resting upon mere allegations or denials of his or her pleadings. *Id.* To withstand a motion for summary judgment, the non-movant must make "specific reference" to evidence in the record. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995); D.N.M.LR-Civ. 56.1(b) (placing similar burden on both parties). Unsubstantiated allegations, no matter how true they might be, cannot be considered. *Gross*, 53 F.3d at 1546.

Title VII Retaliation

Plaintiff maintains that after Plaintiff sought assistance from the equal employment opportunity office at the Department of Energy (DOE), Defendant began retaliating against him. The alleged retaliation consisted of 52 telephone calls to Plaintiff's home, which Plaintiff considers

harassment, and Plaintiff's inability to secure a new job after the DOE terminated his employment, which Plaintiff considers to be prima facie evidence that the DOE blacklisted him from future employment opportunities. Defendant denies all charges of retaliation.

The 52 Telephone Calls

Plaintiff asserts that during a period when Plaintiff was making public comments about potential safety violations at the DOE, he began receiving odd telephone calls. When Plaintiff would answer the telephone, he would be greeted with silence. Although Plaintiff attempted to have the calls traced, he never learned who was making the calls. Nonetheless, because some of the calls took place on the same days that Plaintiff brought his allegations of safety violations to public forums, Plaintiff attributes the calls to a retaliation campaign on the part of the DOE to harass and intimidate Plaintiff.

Plaintiff offers no specific evidence that any of the 52 calls were made by DOE employees. Even if he could create a genuine issue of material fact with specific evidence, such calls do not rise to the level of an adverse employment action upon which to build a Title VII retaliation case. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) ("While the calls were no doubt annoying, they do not amount to adverse employment action.").

Blacklisting

Although Plaintiff alleges that Defendant has prevented him from securing employment since his termination, Plaintiff offers no specific evidence that he was blacklisted by Defendant. Without some evidence (other than Plaintiff's unreasonable speculation) that his former colleagues at the DOE

somehow influenced a potential employer's decision not to hire Plaintiff, summary judgment is appropriate.

Whistle-blowing

Plaintiff asserts statutory causes of action under the whistle-blower provisions of SWDA, TSCA, and CERCLA. However, those Acts each require that a plaintiff file his whistle-blower complaint with the Secretary of Labor for administrative review before seeking judicial review. See 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 300j-9(i)(2)(A); 42 U.S.C. § 9610(b). At oral argument, Plaintiff conceded that he never filed an administrative complaint with the Secretary of Labor addressing these particular statutory claims. Therefore the Court will grant summary judgment on these claims, but without prejudice in order to provide Plaintiff with an opportunity to exhaust his administrative remedies in the event that they are not time barred.

The Court notes that the statutory provisions of SWDA and TSCA authorize judicial review of the Department of Labor administrative decisions by the circuit, not district, courts. See 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 300j-9(i)(2)(A). Thus should Plaintiff exhaust his administrative remedies under SWDA or the TSCA, further judicial review of the administrative decisions should be directed to the Court of Appeals for the Tenth Circuit.

Handling of Plaintiff's EEOC Complaint

Plaintiff asserts that he can maintain a cause of action against Defendant because the EEOC counselor at the DOE initially refused to process his fifth EEOC complaint in October of 1999. Plaintiff admits that the same office accepted his complaint for processing in December 1999. However, Plaintiff claims that Defendant violated a

federal regulation that directs EEOC counselors not to "attempt in any way to restrain the aggrieved person from filing a complaint." 29 C.F.R. 1614.105(g). When asked by the Court, Plaintiff could demonstrate no damages from the delay in processing his complaint. Further, the law is clear that a violation of a federal regulation governing the handling of Plaintiff's EEOC complaint does not create an independent cause of action under Title VII. *Scheerer v. Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991) ("The circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim."); *Jordan v. Summers*, 205 F.3d 337, 342 (7th Cir. 2000) (holding that once the claim was in federal court, the proper course of action for a plaintiff whose claim was mishandled "is to bring a lawsuit against the plaintiff's employer on the merits"). Because Plaintiff is in district court on the merits of his EEOC complaint, summary judgment is warranted on Plaintiff's claim that Defendant unlawfully restrained Plaintiff from filing an EEOC complaint.

Constitutional Violations

Plaintiff alleges that Defendant violated his rights under the First and Fifth Amendments to the United States constitution.[1] Defendant has argued, correctly, that Plaintiff has no recourse to allege discrimination under the Fifth Amendment because Title VII preempts Plaintiff's constitutional claims

---

1 Although Plaintiff asserted violations of the Fourteenth Amendment's equal protection clause in his Original Complaint, Plaintiff conceded at oral argument that the Fourteenth Amendment does not apply to Defendant, a federal employer.

regarding discrimination. *Brown v. General Services Administration*, 425 U.S. 820, 832 (1976). To the extent Plaintiff may have alleged Fifth Amendment violations aside from discrimination, Plaintiff has not demonstrated that a genuine issue of material fact is in dispute.

Further, to the extent Plaintiff asserts First Amendment claims aside from his alleged retaliation for speaking with EEOC officials, such claims are similarly preempted by the whistle-blower statutes. *Cf. Bush v. Lucas*, 462 U.S. 367 (1983) (holding that administrative remedies available to federal employees were sufficient to preclude actions for claims based on the First Amendment retaliation). Because the whistle-blower provisions of TSCA, SWDA, and CERCLA are tailored to address the problems associated with free speech and workplace retaliation, the failure to prevail on the provided statutory remedy precludes a constitutional claim for damages. Otherwise, the congressional allocation of administrative and judicial decision-making "would be eliminated by the simple expedient of putting a different label on the pleadings." *Brown*, 425 U.S. at 833 (internal quotations and punctuation omitted). Thus, summary judgment is required on Plaintiff's constitutional claims. Because Plaintiff's alleged First Amendment claims are closely associated with his statutory whistle-blower claims they also will be dismissed without prejudice.

IT IS THEREFORE ORDERED that Defendant's Motion for summary judgment (Doc. No. 35) directed to Plaintiff's Original Complaint will be GRANTED. Given that the Court will grant summary judgment on Plaintiff's Original Complaint, the Court will dismiss Plaintiff's claims as follows:

(1) Plaintiff's allegations of Title VII retaliation involving telephone harassment and blacklisting will be dismissed with prejudice;

(2) Plaintiff's allegations of violations of the whistle-blower provisions of the SDWA, TSCA, and CERCLA will be dismissed without prejudice;

(3) Plaintiff's alleged cause of action based on Defendant's violation of federal regulations concerning the handling of EEOC complaints will be dismissed with prejudice;

(4) Plaintiff's allegations of constitutional violations of the Fifth Amendment to the constitution of the United States will be dismissed with prejudice;

(5) Plaintiff's allegations of constitutional violations of the First Amendment to the constitution of the United States will be dismissed without prejudice.

IT IS FURTHER ORDERED that any causes of action Plaintiff may be attempting to assert based on Defendant's conduct that occurred before Plaintiff's termination are barred by res judicata, and should have been pursued in Plaintiff's former suit alleging disability discrimination and Title VII retaliation, *Rockefeller v. Abraham*, Nos. 00-248 & 01-2054 (19th Cir. Nov. 15, 2001).

IT IS FURTHER ORDERED that all other pending motions are denied as moot. Additionally, the Court has considered Plaintiff's oral motion for reconsideration, which Plaintiff made at the hearing on March 19, 2002, along with Plaintiff's Statement of Alleged Defendant's Admissions in Civil Case No. 01-399 that Plaintiff tendered in open court, and denies Plaintiff's motion for reconsideration.

s/James A. Parker

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
Plaintiff,

vs.

Doc. 55

No. CIV 01-0399
JP/LCS

SPENCER ABRAHAM,
Secretary, United States
Department of Energy,
Defendant.

ORDER

THIS MATTER came before the Court on March 13, 2002, for a hearing on Plaintiff's Motion to Compel (Doc. 31), filed January 8, 2002. On March 14, 2002, I issued an Order denying the Motion as to Request for Production of Documents Numbers 1, 2, and 3, and taking the Motion under advisement as to Request for Production Number 4, pending submission and *in camera* review of the documents requested. Having reviewed the documents responsive to this request *in camera*, I find that the Motion with respect to Request for Production Number 4 should be GRANTED SUBJECT TO THE CONDITIONS SPECIFIED HEREIN.

In Request for Production Number 4, Plaintiff seeks production of records reflecting long distance calls made by DOE employee Ron O'Dowd for the period of August 1997 to August 2001. Plaintiff asserts that these documents are relevant to his blacklisting and harassment claims. A party may request production of documents that contain matters within the scope of Rule 26(b) and are in possession, custody or control of another party.

FED.R.CIV.P. 34(a). Rule 26(b), as amended, provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the claim or defense* of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *For good cause*, the court may order discovery of any matter *relevant to the subject matter involved in the action.* Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED.R.CIV.P. 26(b)(emphasis added).

At the hearing of March 13, 2002, I directed Plaintiff to submit a list of area codes and exchanges that he believes would support his claim of blacklisting and harassment by March 19, 2002. Plaintiff has submitted such a list. Having reviewed the phone records and Plaintiff's list, I find that the numbers specified by Plaintiff on his list are relevant to his claims and discoverable under FED.R.CIV.P. 26(b). Defendant may redact all telephone numbers that do not contain the area codes and exchanges on Plaintiff's list from the telephone records. Defendant shall produce the redacted telephone records to Plaintiff by March 29, 2002. Plaintiff shall not call, or cause an agent to call, any telephone number so produced without motion and further order of the Court.

IT IS SO ORDERED. s/Leslie C. Smith
UNITED STATES MAGISTRATE JUDGE

(2)

Supreme Court, U.S.
FILED

No. 02Q21621 MAY 2 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE),
Respondent.

On Appeal to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME
Nos. 4 - 7

Tod N. Rockefeller, pro se
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

END

45 pp

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APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff / Appellant, USCA No. 02-2117

vs.

SPENCER ABRAHAM, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,
Defendant /Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
CIVIL NUMBER 01- 0399 JP/LCS

REPLY BRIEF OF PLAINTIFF / APPELLANT

ORAL ARGUMENT IS REQUESTED

TOD N. ROCKEFELLER, Pro se
319 Sunnyview Street
Carlsbad, NM 88220
(505) 628 - 3541

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Appellant served his Opening Brief on 6/03/02 (henceforth "O-Brief ") Appellee served a Response Brief on 7/23/02 (henceforth"Response"). Appellee addressed five issues in the Response. Appellant will reply to each.

ARGUMENT

A. CLAIMS ARISING UNDER TITLE VII.

1. Harassing Calls

All of what Appellee claims in the Response for this issue is irrelevant to this instant appeal due to what had occurred in the district court discovery process. Appellee has failed to respond to what was pointed out within Appellant's Opening Brief, First Issue at 12-14. The Magistrate found that the telephone area codes and prefixes for Request for Production No. 4 (henceforth "Request No. 4") "are relevant" to

Appellant's opposition to summary judgment. Defendant IS withholding "facts essential" to Appellant's opposition. See Celotex, 477 U.S. at 326. "These facts certify that Appellee's motion for summary judgment [doc. nos. 35, 36] was indeed a "premature" motion, . . ." O-Brief at 13

To claim the Request No. 4 would be of "no value", Defendant states that Appellant "did not request any logs reflecting calls made to his unlisted number." See Response at 12. **This claim of Appellee is bogus and inapposite.** The last harassment telephone call that Appellant had listed within his "Exhibit Harass" (doc. 43 at 7) was on 8/13/99. On this day [8/13/99] of the last harassment call, Appellant changed his phone number to an unlisted number in his attempt to stop the harassment calls. The argument of Appellee makes no sense.

Next, Appellee attempts to claim that there is no "inference that the calls were made for retaliatory reasons under Title VII . . . because he engaged in activities protected by Title VII." See Response at 12 Appellee is wrong. Appellant had been providing testimony and initiating various legal proceedings against Appellee concerning "safety and environmental law violations". This was stated within Appellant's Equal Employment Opportunity ("EEO") Complaint ("EEO-V") that was filed. See doc. 43 at 6. The harassment calls which Appellant had received were in close temporal relations to the proceedings with which he was involved in alleged retaliation of harassment and intimidation. The Supreme Court has ruled that under Title VII "former employees . . . may sue . . . for . . . retaliatory post-employment actions." See Robinson, 519 U.S. at 337.

The argument that Appellee makes concerning Fed.R.Civ.P 56(f),that summary judgment was appropriate because Appellant did not file a Rule 56(f) affidavit [for Request No. 4] has no foundation and fails. Appellant did not need to file such an affidavit, because the Magistrate had ruled that Appellant's Request No. 4 documents "are relevant to his claims" in granting the discovery request. See doc. 55 at 2. Appellant had been denied "relevant" discovery ruled by the Magistrate which invokes the ruling of the Supreme Court that "allows a summary judgment motion to be denied, . . . , if the nonmoving party has not had an opportunity to make full discovery." See Celotex, 477 U.S. at 326.

The district court judge had granted the motion for summary judgment, during the Oral Argument on **3/19/02**, PRIOR to when the ruling on Appellant's Motion to Compel discovery was ruled upon by the Magistrate. See doc. 55 filed on **3/20/02**. Appellant had thoroughly explained the need for discovery concerning Request No. 4 within doc. 31 at 3, 4; and doc. 39 at 4, 5. The evidence within Request No. 4 has been suppressed by the district court judge, and that violates Due Process. See Brady, 373 U.S. at 86-88.

Appellee makes a **knowingly false representation** concerning Request No. 4 by stating: **"the logs submitted to the court only reflect calls made after April 1999, many months after the alleged harassing phone calls were made to his home."** See Response at 12 The last harassment call reported by Appellant occurred on **8/13/99**.

There were 16 harassment calls reported by Appellant from May through August 1999 within "Exhibit Harass". See doc. 43 at 7 Appellant requests that this Court impose sanctions upon Appellee for these bogus and false representations made above "to deter repetition of such conduct." See Fed.R.Civ.P. 11(c)(2).

2. Blacklisting

Appellee attempts to claim that Appellant's specific allegations of blacklisting at CEMRC and FLETC are addressed by three self-serving very general denial affidavits of Hunter, Inlow, and O'Dowd. Appelleeis wrong. Appellee's witnesses above are required to be impeached due to their demonstrated conflicting testimony, bias, and false representations towards Appellant as thoroughly outlined within doc. 60.

Conflicting testimony impeaches Appellee's witnesses above. See Michigan, 494 U.S. at 348-354; Oregon, 420 U.S. at 720-724; Harris, 410 U.S. at 226; and Walder, 347 U.S. at 64. Also, admitted "bias" is a "Permissible and established basis of impeachment of a witness." See United States v. Abel, 469 U.S. at 50. Additionally, Fed.R.Civ.P. 609(a) allows impeachment of witnesses for "false statement[s]". See Mincey, 437 U.S. at 398; New Jersey, 440 U.S. at 459. Appellant's doc. 60 clearly demonstrates all of the above concerning Appellee's witnesses.

Since Appellee's EEO Office refused to investigate the specific allegations of blacklisting at CEMRC and FLETC (doc. 38 at 2-5), with Appellee's witnesses and affidavits above impeached, Appellee admits to the blacklisting of Appellant. Doc. 60 is far from being "MOOT" as as the district court claims. See doc. 62.

In addition, concerning **CEMRC [partially funded by Appellee]**, Appellee's witness details that Appellant "was not a finalist for any position." Does this explain why Mr. Jeremy Staley, who had no college degree or relevant experience, was hired for the job "Computer Technician-II" which Appellant had also applied for ? Appellant has a Master of Science degree and over six years of experience directly related to the CEMRC job. Appellee failed to touch upon any of these circumstances above concerning CEMRC for obvious reasons.

B. CLAIMS ARISING UNDER THE ENVIRONMENTAL STATUTES.

Appellee claims that the district court did not have jurisdiction of Appellant's claims under the environmental statutes, and that due to this "dismissal was proper." Response at 17 Appellee is wrong. Appellee repeats the same previous claim that complaints concerning the environmental statutes involved with this case can only be made to the U.S. Department of Labor ("DOL"). Appellee again refuses to address the claim of Appellant. See doc. 38 at 7, 8.

The employee protection provisions [15 U.S.C. § 2622(a); 42 U.S.C. § 9610(a); 42 U.S.C. § 300 j-9(i)] of the environmental statutes do not eliminate applicable law concerning disabled persons [29 C.F.R.§ 1614.302] for filing a "mixed" complaint with Appellee's EEO Office. A general principle of statutory construction is outlined within 29 C.F.R. § 1630.1(a)(2) [Relationship to other laws], this section states:

> "This part does not invalidate or limit the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection of the rights of individuals with disabilities than are afforded by this part."

The same is true for the environmental statutes above. E.g.: those statutes do not "invalidate or limit the remedies . . . of individuals with disabilities" such as Appellant.

A "mixed" EEO complaint "may contain . . . allegations that the Merit Systems Protection Board (MSPB) has jurisdiction to address." See 29 C.F.R. § 1614.302. An MSPB regulation describes their jurisdiction as including taking complaints which "evidences a violation of law . . . or substantial and specific danger to public health" such as the environmental statues above. Appellee fails to explain how or why the general rule of statutory construction quoted above does NOT apply to the environmental statutes noted above. The district court had proper jurisdiction over Appellant's "mixed" EEO Complaint.

C. CLAIM REGARDING APPELLANT'S EEO COMPLAINT.

During the processing of Appellant's EEO Complaint by Appellee, Appellant had alleged the improper dismissal of a portion of the Complaint with knowingly false representations. Appellee had refused to investigate the legitimate allegations of "retaliation" which "are considered to be complaints of discrimination . . ." See 29 C.F.R. § 1614.103(a). Appellant made the allegations of EEO law within doc.38 at 1, 2.

E.g.: the "letter dated 2/21/00" which described the alleged violations. **Appellee failed to deny these allegations of EEO law violations, within the 2/21/00 letter**, which rise substantially higher than mere poor processing of a complaint such as untimeliness. The Supreme Court has ruled that:

> "Indeed, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." See Davis, 442 U.S. at 242.

Appellee has admitted, as described above, to refusing to afford Appellant the "equal protection" of EEO law, and **have violated Appellant's Fifth Amendment constitutional right.** This is contrary to the claim of Appellee that this issue concerns only mere poor processing of Appellant's EEO Complaint.

D. CONSTITUTIONAL CLAIMS.

The ruling Appellee cites, Brown v. GSA, 425 U.S. 820 (1976), coincides with 42 U.S.C. § 1981a(a)(1) which states:

> "A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . ."

However, as Appellant has pointed out several times, the Solid Waste Disposal Act ("SWDA") applies to Appellee in this case. Appellee has not denied that all of the requirements of the SWDA apply including 42 U.S.C. § 6961(a). Section 6961(a) "waives any immunity otherwise applicable to" Appellee. See doc. 38 at 9; and O-Brief at 21-23. The district court ignored all of the above.

The Supreme Court has ruled that when the immunity of a federal entity has been waived, **an aggrieved federal employee may sue with a "constitutional tort claim"** such as Appellant's claim (emphasis added). See Federal Deposit Insurance Corp., 510 U.S. at 472. Therefore, the ruling held in Johnson, 421 U.S. at 459 applies to this instant appeal that Title VII does NOT preempt Constitutional claims. The three 10th Circuit cases which Appellee cites [to support the claim, that for Appellant, Title VII is the exclusive remedy] are inapposite because none of those cases involve the waiver of the SWDA's § 6961(a).

E. THREE MOTIONS FOR PARTIAL JUDGMENT

1. First Motion.

As described above within doc. 40, Appellant had given Judicial Notice of Adjudicative Facts. Appellant based three admitted facts within doc. 47 upon what was found in the Federal Register. It was explained within doc. 43 at 3 that: "As 44 U.S.C. § 1507 requires: "The contents of the Federal Register shall be judicially noticed . . ."" Appellee has failed to deny any of this and has therefore admitted to pretext, the destruction of evidence of a blacklisting nature about Appellant,

and posting blacklisting information about Appellant over the Internet from 2/98 thru present. See doc. 47

2. Second Motion.

Appellee claims that the failure to file a "Response" [Brief in Opposition] to Appellant's Petition for Writ of Certiorari (henceforth "Petition 01-1143") in the U.S. Supreme Court does not amount to any "admissions". See Response at 14. Appellee is wrong. Doc. 50 at 2, 3 thoroughly explains that Appellee HAD taken the position, concerning Petition 01-1143, that the right to controvert any of the facts or law within said Petition was waived. See Sup.Ct. Rule 15(2).

The Supreme Court has ruled that: "where a party assumes a certain position in a legal proceeding, . . . , he may not thereafter, . . . , assume a contrary position." See Davis, 156 U.S. at 689. Henceforth, Appellee is NOT now free, within this instant proceeding, to controvert any of the facts or law within Petition 01-1143 that are detailed within doc. 50. Appellee is collaterally estopped from doing so. Appellee has admitted to the 14 violations outlined within doc. 50. This is fact and well beyond dispute. What is detailed above is fact and law and far from being "bizarre" as Appellee claims. See Response at 13.

3. Third Motion.

Appellant's third motion explains that the first two motions were titled incorrectly as Motions for Partial Summary Judgement. The first motion was actually a Motion for Judgment on the Pleadings, and the second motion was actually a Motion for Judgment as a Matter of Law. Doc. 60 at 1 [Memo]. This third Motion for Judgment as a Matter of Law was not responded to at all by

either the district court or Appellee.

It is detailed within this motion, with admitted facts, how three of Appellee's witnesses [Hunter, Inlow, & O'Dowd] have offered conflicting testimony, demonstrated bias, and made false representations concerning Appellant. doc. 60 at 2-5 These actions of Appellee's witnesses warrants impeachment of their testimonies regarding Appellant.

The district court denied the three motions above of Appellant [doc. nos. 47, 50, 60] totaling 19 admissions of fact of Appellee concerning violations towards Appellant. The only reason given by the district court for the denial of the three motions, containing admitted facts, was that the motions were somehow "MOOT". **The district court abused its discretion by refusing to admit evidence of admitted facts** within doc. nos. 47, 50, and 60. See Beech Aircraft Corp., 478 U.S. at 172. It is also an abuse of discretion when a motion is denied without a legitimate explanation. See Rose, 2000 Fed. App. 0053P; See also Jackson, 788 F.2d at 1089.

Appellee makes a claim that all three of the motions above were untimely by stating: **"This Court should also affirm the district court's decision because Rockefeller's motions were untimely."** See Response at 24. As explained to Appellee above, the First Motion [doc. nos. 46, 47] was a Motion for Judgment on the Pleadings. This motion can be served: "After the pleadings are closed but within such time as not to delay the trial, . . ." See Fed.R.Civ.P. 12(c). The Second and Third Motions were Motions for Judgment as a Matter of Law, which: "may be made at any time before submission of the case to the jury." See

Fed.R.Civ.P. 50(a)(2). It is alleged that Appellee's statement that: **"Rockefeller's motions were untimely"**, is **another knowingly false representation** in Appellee's attempt to mislead this Court.

F. DUE PROCESS VIOLATIONS

Within Appellee's Response section about harassment telephone calls, the admissions of fact within two motions which Appellant had filed [doc. nos. 47 & 50] are denied. Appellee claims that the admitted facts within doc. 47 are based upon Appellant's Request for Admissions [doc. 40]. Appellee fails to note the relevant portion of doc. 40. Doc. 40 is both a Request for Admissions and Judicial Notice of Adjudicative Facts.

Appellee claims that the Request for Admissions was untimely. Appellee is wrong. Appellant had prepared a Request for Admissions to follow doc. 20, long before the expiration of discovery, but the district court judge had ruled doc. 20 as **"premature"** and denied the motion. The district court did rule that Appellant's doc. 20 evidence could be resubmitted at an "appropriate" time such as in response to a "Motion". See doc. 23.

Appellant had resubmitted his evidence, along with doc. 38, to address a motion as the district court ordered that Appellant could do. Along with his evidence, Appellant had to request [doc. 40] that Appellee admit to the authenticity of his evidence. Appellant knew that he had to do his best to authenticate his evidence. This was so because the district court was likely to dispel Appellant's evidence if he did not do so as had

been done by this district court in Flor, 93-1342.

In the process of denying doc. 20, however, the district court violated Appellant's Fifth Amendment Due Process rights. This is so because the district court's Order [doc. 23], on 10/11/01, came the very NEXT DAY after Appellee's Response filed on 10/10/01 [doc. 22]. Appellant was denied his Reply to doc. 22 before judgment was made [doc. 23] as D.N.M.LR-Civ. 7.6(a) requires. See doc. 25 at 3 filed on 10/23/01. Appellant alleges that all of this was done for the purpose of **suppressing the incriminating evidence** that Appellant was attempting to introduce into the record of the case [01-399 JP/LCS]. These actions by Appellee and the district court violate Appellant's Fifth Amendment Due Process rights. See U.S. v. Classic; U.S. v. Price; Scheuer; Walker; and Williams. The district court is supposed to be forbidden to violate Appellant's Due Process rights. See Davis, 442 U.S. at 234.

G. JUDICIAL INTEGRITY.

The Sup.Ct. has repeatedly emphasized the imperative of judicial integrity, especially with regard to the Constitution. For example:

> ". . . it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, ... Why otherwise does it direct the judges to take an oath to support it ? This oath certainly applies in an especial manner to their conduct in their official character. How immoral

> to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support ! "

See Marbury, 5 U.S. at 180. The district court judge has violated the oath that he had sworn to support the Constitution, and he had certainly "knowingly" done so. Also:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives injury. One of the first duties of government is to afford that protection." Id at 163.

Justice Brandeis (dissenting) expounded upon the imperative of judicial integrity:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

See Olmstead, 277 U.S. at 485. In Elkins, 364 U.S. at 222, 223, the Sup.Ct. repeats the imperative of Justice Brandeis above concerning judicial integrity, and again in Mapp, 367 U.S. at 659. The Sup.Ct. also states that:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." See Id.

Appellee and the district court have done both: failure to observe the laws of the United States [SWDA], AND "disregard of the" Constitution. See Petition 01-1143 at 1 thru 7, A-13 thru A-15, A-45, A-46. The Sup.Ct. has emphasized that the lack of judicial integrity not only imperils our Government, but in addition, that there is also:

> **"danger to public welfare" from "wrongful judicial conduct."**

Pennekamp, 328 U.S. at 346. See also Bivens, 403 U.S. at 389; Carlson, 446 U.S. 14; and Ludwig, 427 U.S. at 625, 626.

CONCLUSION

For the above cited reasons, Appellant prays that this Court reverse the district court's grant of summary judgement, and remand the case back to Trial Court as a Matter of Law. See Anderson, 477 U.S. at 252.

Dated: August 9th, 2002

Respectfully submitted,
s/Tod N. Rockefeller
319 Sunnyview Street
Carlsbad, NM 88220
(505) 628 - 3541

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

THIRD MOTION FOR
PARTIAL JUDGMENT AS A MATTER OF LAW

COMES NOW Plaintiff Rockefeller and moves this Court for the issuance of an Order granting this instant Motion. Facts supporting the guilt of Defendant within this Motion are set forth in Plaintiff's Memorandum in Support of Third Motion for Partial Judgment as a Matter of Law filed herein.

Dated: March 18th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

MEMORANDUM IN SUPPORT OF
THIRD MOTION FOR PARTIAL JUDGMENT
AS A MATTER OF LAW

I. BACKGROUND

1. Plaintiff filed two motions previous to this instant motion which were titled incorrectly. Plaintiff apologizes to the Court for any inconvenience. The first motion was titled: Motion for Partial Summary Judgment, served on 3/1/02 (henceforth "1st Motion"). Plaintiff's 1st Motion was actually a Motion for Judgment on the Pleadings which was filed "after the pleadings" were "closed". See Fed.R.Civ.P. 12(c). This was also explained within the 1st Motion at 1.

2. Plaintiff's next motion was titled: Second Motion for Summary Judgment, served on 3/11/02 (henceforth "2nd Motion"). Plaintiff's 2nd Motion was actually a Motion for Judgment as a Matter of Law. See Fed.R.Civ.P. 50(a)(2). This was explained

within the 2nd Motion at 7. Facts had arisen within Plaintiff's Petition within the Supreme Court of the United States (henceforth "SCt.") after the 1st Motion was filed, which prompted and justified filing of Plaintiff's 2nd Motion.

3. So far, Plaintiff has clearly outlined a total of 17 admissions made by Defendant of blacklisting and retaliations taken by Defendant against Plaintiff. This instant Motion (henceforth "3rd Motion") adds two additional admissions of blacklisting by Defendant.

II. IMPEACHMENT OF THE TESTIMONIES OF DEFENDANT'S WITNESSES

4. Black's Law Dictionary, 7th ed., defines "impeachment" as follows:

> "Impeachment. 2. The act of discrediting a witness, as by catching the witness in a lie **or** by demonstrating that the witness has been convicted of a federal crime."

The definition in Black's above coincides with the Fed.R.Civ.P. and rulings made by the Supreme Court as will be detailed below.

5. There are three methodologies, applicable to this case, for impeaching the testimonies which Defendant has filed.

6. First, the SCt. decided that voluntary evidence obtained can "be used to impeach the Defendant's conflicting testimony." See *Michigan v. Harvey*, 494 U.S. 344 (1990); See also *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971); *Walder v.United States*,

347 U.S. 62, 64 (1954). Defendant's witnesses have offered conflicting testimony as will be detailed below.

7. The second method for the impeachment of the testimonies of Defendant's witnesses is concerning their demonstrated and admitted "bias" towards Plaintiff. The SCt. has ruled that although "the Rules do not by their terms deal with impeachment for "bias," . . . "We think . . . that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption." See *United States v. Abel*, 469 U.S. 45, 49, 51 (1984). The bias of Defendant's witnesses towards Plaintiff will be demonstrated below.

8. Lastly, the Fed.R.Evid. 609(a) allows impeachment of witnesses for "crimes", "dishonesty", and a "false statement." It has been admitted by Defendant that Defendant's three witnesses Ron O'Dowd, Earl Hunter, and Rush Inlow have each previously made knowingly false representations towards Plaintiff. These witnesses of Defendant above have committed criminal felony violations by making a "false statement in a Government matter." See the False Statements Accountability Act of 1996 [Public Law 104-292]. These facts will be detailed below.

9. Fed.R.Evid. 609(a)(2) **requires** that evidence of such a violation above [Public Law 104-292] **"shall be admitted if it involved dishonesty or false statement, . . ."** to impeach the testimonies of Defendant's witnesses (emphasis added).

III. DEFENDANT'S FALSE REPRESENTATIONS IN A GOVERNMENT MATTER

10. The following admissions of Defendant were

voluntary. Therefore, the reliable, probative, and inculpatory evidence obtained by Plaintiff from Defendant can be used for impeachment purposes. See *New Jersey v. Portash*, 440 U.S. 450, 459 (1979); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).

11. False Representation of Ron O'Dowd: "In fact, AOO has informed us that Appellant [Plaintiff] has already engaged in extreme verbal harassment of co-workers . . . see Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd (November 19th, 1997)."

12. Plaintiff made an averment that this statement was knowingly false within ¶¶ 20, 21 of his Original captioned Complaint above. Defendant has failed to deny this specific averment and has therefore admitted to it. See Fed.R.Civ.P. 8(d).

13. False Representation of Earl Hunter: this is detailed within "Averment No.8" of Plaintiff's 2nd Motion. Plaintiff will summarize below the false representation which Defendant has admitted to. Mr. Hunter claimed that there was no requirement to issue an employee a Performance Improvement Plan ("PIP") before or after an employee receives failing performance ratings.

14. Plaintiff's 2nd Motion referenced above specifically details that an applicable employee performance management program of Defendant DOES require the issue of a PIP after an employee receives failing ratings. Mr. Hunter made this false representation in his attempt at escaping from a demonstration of pretext for issuing Plaintiff a PIP that was five months late (emphasis added).

15. False Representations of Rush Inlow: Mr. Inlow was Defendant's removing official who decided that Plaintiff should be removed from federal service for putative "poor performance."

Plaintiff clearly demonstrated three different instances of pretext for his removal. The evidence which Plaintiff submitted to Inlow made no difference.

16. The three demonstrations of pretext within Plaintiff's 2nd Motion (Averments 1, 8, & 9),that have now been admitted to by Defendant, also prove Inlow's false representations that Plaintiff was a "poor performer."

17. The three demonstrations of pretext for Plaintiff's removal are: (1) Plaintiff's receiving failing performance ratings 2 ½ months after his expert report identifying Defendant's unsafe RH-72B nuclear waste shipping cask. (2) Plaintiff's removal six weeks prior to Defendant's Record of Decision ("ROD") for "Safe Shipping Containers" which contained the unsafe RH-72B container which Plaintiff had reported. (3) Plaintiff was issued a PIP, described within ¶ 14 above, which was five months late, but only two days after Defendant was contacted by Plaintiff's Equal Employment Opportunity ("EEO") Complaint Counselor.

IV. CONFLICTING TESTIMONIES AND DEMONSTRATED BIAS

18. All three of Defendant's witnesses above have claimed that Plaintiff harasses co-workers, is a "poor performer", threatens the physical safety of co-workers, and various other admitted bogus claims in retaliation for Plaintiff's reporting of safety issues.

19. Defendant has admitted that all of the claims above concerning Plaintiff are false. This clearly demonstrates bias towards Plaintiff by O'Dowd, Hunter, and Inlow.

20. Plaintiff has demonstrated bias towards him by Defendant's witnesses as described above. Defendant has admitted to this. The Supreme Court ("SCt."), however, has required that "the existence of . . . bias" towards a party only be "more probable" by averments made [not proven or admitted to] to warrant impeachment of the opposing party's witness testimony. See *United States v. Abel*, 469 U.S. at 52.

21. Plaintiff, as described above, has exceeded the SCt.'s ruling concerning the application of bias to implement impeachment of Defendant's witness testimonies.

22. Defendant's witnesses had all claimed not to have engaged in retaliations against Plaintiff for his reporting of safety issues, which has now been admitted to be false. Defendant's witnesses [O'Dowd, Hunter, & Inlow] have engaged in retaliations, including blacklisting, against Plaintiff.

23. For this instant Complaint, Defendant's witnesses now offer conflicting testimony that they have not engaged in retaliations, such as blacklisting, against Plaintiff, as they have admitted to have done above.

V. CONCLUSION

24. All of the above [per Fed.R.Evid. 609(a)(2)] requires that the testimonies of Defendant's witnesses, concerned with the alleged blacklisting of Plaintiff at the Carlsbad Environmental Monitoring and Research Center ("CEMRC") and the Federal Law Enforcement Training Center ("FLETC"), be impeached.

25. Since Defendant refused to investigate and properly respond to Plaintiff's specific and factual

averments of blacklisting at CEMRC and FLETC, other than the very general testimonies described above which are required to be impeached, Defendant has failed to deny these averments of Plaintiff.

26. Defendant has admitted to blacklisting Plaintiff at CEMRC and FLETC. See Fed.R.Civ.P.8(d).

27. Defendant, as described above, has had the chance to be fully heard on the claims of Plaintiff. Defendant has admitted to the averments above which detail that Defendant HAS engaged in blacklisting and severe retaliations against Plaintiff. This is in addition to the blacklisting outlined in Plaintiff's 1st and 2nd Motions.

28. The evidence in this case in Plaintiff's favor "is so one-sided that" Plaintiff "must prevail as a matter of law." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Defendant was contacted and Plaintiff has been unable to determine his position on this Motion.

Prayer for Relief

Defendant has no evidentiary basis for a reasonable jury to find for him on his blacklisting and retaliations towards Plaintiff, which has been admitted to. Plaintiff, therefore,demands a judgment as a matter of law granting this instant motion, with also a jury trial for the determination of damages.

Dated: March 18th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,
Plaintiff,

v.

SPENCER ABRAHAM , in his
official capacity as SECRETARY,
UNITED STATES DEPARTMENT
OF ENERGY (DOE),
Defendant.

Civ. No.
01-399
JP/LCS

SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff Rockefeller and moves this Court for the issuance of an Order granting this instant Motion. Facts supporting the guilt of Defendant within this Motion are set forth in Plaintiff's Memorandum in Support of Second Motion for Partial Summary Judgment filed herein.

Dated: March 11th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST, WIPP SITE TEAM, CARLSBAD AREA OFFICE, U. S. DOE,
Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),
Defendant.

Civ. No. 01-399 JP/LCS

MEMORANDUM IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

1. Plaintiff filed two complaints (99-1059 PK/KBM & 00-0652 PK/KBM) within the United States District Court for the District of New Mexico (henceforth "USDC-NM"). These complaints were concerning Plaintiff's removal from federal service on 12/10/97 and other retaliations taken against him by the same Defendant captioned above.
2. The USDC-NM dismissed the two previous complaints, described above, with an Order filed on 12/19/00 (doc 64).
3. Plaintiff filed two appeals of the dismissal of his Complaints above with the United States Court of Appeals for the Tenth Circuit (henceforth "10th Cir."). These appeals were docketed by the

10th Cir. as Nos. 00-2480 & 01-2054.

4. Plaintiff's 10th Cir. appeals above were dismissed with an Order and Judgment filed on 11/15/01.

5. Plaintiff filed a timely Petition for Writ of Certiorari (henceforth "Petition") with the Supreme Court of the United States (henceforth "SCt.") concerning the 10th Cir.'s dismissal of 00-2480 & 01-2054. Plaintiff's Petition was docketed as No. 01-1143.

6. On 2/19/02, Defendant filed a waiver of the right to file a Brief in Opposition (henceforth"**BiO**") to Petition 01-1143 with the SCt..

II. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

7. The adjudicative facts which Plaintiff wishes to be judicially noticed reside within his SCt. Petition described above.

8. This Petition meets the requirements of Fed.R.Evid. 201(b) in that these facts are "not subject to dispute" due to Defendant's filing of the waiver so as not to file a BiO. In addition, the Petition is most certainly "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned [the Supreme Court of the United States (Sct.)].

9. In further addition: "The most frequent use of judicial notice of ascertainable facts is in noticing the contents of court records." Charles Allan Wright & Kenneth W. Graham Jr., Federal Practice and Procedure: Evidence sec. 5106, at 505 (1st ed. 1977 & supp. 1997).

10. Defendant was served with all of this information (99-1059 PK/KBM & 00-0652 PK/KBM) well **over a year ago** and has a full

opportunity to respond.

III. REQUIREMENTS SIGNIFICANT TO DEFENDANT'S ADMISSIONS TO MATERIAL ALLEGATIONS

11. The SCt. pleading which Plaintiff filed is his Petition. Defendant's avenue for a responseto Plaintiff's averments within the Petition was a BiO. Defendant failed to file a BiO as described above.

12. A SCt. BiO is controlled by this Court's Rule 15 which requires that:

> ". . . the brief in opposition should address any perceived misstatement of fact or law that bears on what issues would be before the Court if certiorari was granted."
>
> Also: "Any objection to consideration of a question presented . . . , may be deemed waived unless called to the Court's attention in the brief in opposition."

13. Within his Petition, Plaintiff made thirteen averments where each "bears on" the "issues" "before the Court". Black's Law Dictionary, 7th ed., defines "averment" and "allegation" as follows:

> "**Averment** - A positive **declaration of fact**; esp., an assertion or allegation in a pleading."
>
> "**Allegation** - 1. The act of declaring something to be true. **2. Something declared or asserted as a matter of fact, esp. in a legal proceeding; a party's formal statement of a factual matter as being true or provable,**

without its having yet been proved."

14. The SCt. requirements concerning a BiO, within that Court's Rule 15 quoted above, is the equivalent of **Fed.R.Civ.P 8(d) Effect of Failure to Deny**. Rule 8(d) requires that:

> "Averments in a pleading to which a responsive pleading is required, . . ., are admitted when not denied in the responsive pleading."

III. DEFENDANT'S ADMISSIONS TO MATERIAL ALLEGATIONS

15. Averment No.1:

> **"When Petitioner [Plaintiff] began identifying safety deficiencies, . . ., the DOE engaged in reprisals towards Petitioner.** The retaliations against Petitioner culminated in his removal from federal service on 12/10/97 for putative "poor performance"."

See Petition at 1 E.g.: Failing annual performance appraisal after Plaintiff's reporting of the unsafe RH-72B nuclear waste shipping cask. See Petition at 2, A-37.

16. Averment No.2: **Plaintiff identified a design failure of Defendant's RH-72B nuclear waste shipping cask resulting in a faulty Radioactive Containment Seal**. Plaintiff requested, through discovery [Request No. 10], documents related to the approval of the safety report of the RH-72B cask. "Defendant DOE claimed that: ". . . the information has nothing to do with the issues in this case." See doc. 48 at 3"

Plaintiff replied that: **"This assertion of Defendant is obviously bogus."** Also: **"This evidence has been improperly suppressed . . ."** See Petition at 2. See also Averment No.8.

17. Averment No.3: **Relevant admissible evidence actually submitted [558 pages] by Plaintiff was improperly excluded.** See Petition at 3 & A-27 thru A-30.

18. Averment No.4: The DOE has failed to controvert the facts detailed within A-31 thru A-46. See Petition at 4. See also Averment Nos. 8 thru13.

19. Averment No.5: **Plaintiff identified flawed air monitoring** of radionuclide aerosols **and inadequate** underground repository **fire protection controls** at Defendant's Waste Isolation Pilot Plant ("WIPP").

20. Averment No.6: **Retaliations from Defendant towards Plaintiff that are in very close temporal relation to Plaintiff's whistleblowing**, described partially above, included two failing annual performance appraisals and two transfers. See Petition at 5

21. Averment No.7: Defendant claimed that the exclusive remedy for federal employee whistleblowers is the Civil Service Reform Act ("CSRA"). Plaintiff clearly demonstrated that this is NOT so. See Petition at 6.

22. Averment No.8: **Defendant has made knowingly false representations.** For example, Defendant claimed: ". . ., there is no requirement that a **PIP** [Performance Improvement Plan] be issued before or after an employee gets a failing rating." Plaintiff replied that: "This representation is knowingly false (emphasis added) See Exhibit ADA-17." The "Exhibit ADA-17" was the DOE Albuquerque Operations Office ("AOO")

Performance Management and Awards Programs (dated 3/26/96 and current at the time). This AOO Program, described above, required the following: "8. Performance Based Actions. The final rating of record may be used to take necessary action **when an individual's performance is rated as "fail" . . . , the following course(s) of action will be taken: Issuance of PIP." Plaintiff's PIP was five months late, and two days after contact of Defendant by Plaintiff's Equal Employment Opportunity ("EEO") Counselor**. See Petition at A-35. This demonstrates pretext.

23. Averment No.9: Plaintiff's identification of the unsafe RH-72B shipping cask, his removal on 12/10/97, and Defendant's issue of their "Safe Shipping Containers" Record of Decision ("ROD") on 1/23/98 are all related. **Both Defendant's issue of a PIP to Plaintiff above, and the issue of their ROD establish causation for Plaintiff's removal from federal service and for his being blacklisted.** See Petition at A-36.

24. Averment No.10: **Defendant refused to investigate Plaintiff's Fourth EEO Complaint which is a violation of 29 C.F.R. Part 1614.102(c)(5).** See Petition at A-39.

25. Averment No.11: Plaintiff makes a specific allegation of being blacklisted at the Carlsbad Environmental Monitoring and Research Center ("CEMRC"). **Defendant fails to rebut this specific allegation and admits to blacklisting of Plaintiff.** See Petition at A-42.

26. Averment No.12: **False representations are made by Defendant's representative O'Dowd** to a United States Department of Labor ("DOL") Administrative Law Judge ("ALJ") that Plaintiff had made only "mere oral comments" to an agent of the

United States Environmental Protection Agency ("EPA"). Defendant admits that Plaintiff made written comments, NOT "mere oral comments", to the EPA. **This represents O'Dowd's guilt in conducting retaliations against Plaintiff to get his DOL Complaint dismissed.** See Petition at A-43.

27. Averment No.13: **Defendant violates Title VII [42 U.S.C. § 2000e-3]** with the unlawful dismissal of a portion of Plaintiff's Fifth EEO Complaint and the attempted restraint of Plaintiff's effort to file the complaint. These actions are also violations of 29 C.F.R. Part 1614 Sections 105(g) and 107. See Petition at A-44.

28. Averment No.14: Plaintiff is protected under the Americans with Disabilities Act ("ADA"). Defendant made an unreasonable request for a medical history from Plaintiff's doctor in violation of the ADA to intimidate Plaintiff's medical provider. This intimidation is also a form of blacklisting in regard to Plaintiff's ability to obtain services from his medical providers. See Petition at A-45 & A-46.

V. CONCLUSION

29. Defendant, as described above, has had the chance to be fully heard on the claims of Plaintiff. Defendant has admitted to all of the fourteen averments above which detail that Defendant HAS engaged in blacklisting and severe retaliations against Plaintiff. This is in addition to the blacklisting outlined in Plaintiff's first Motion for Partial Summary Judgmentserved on 3/1/02.

Defendant was contacted and noted that this motion is opposed.

Prayer for Relief

Defendant has no evidentiary basis for a reasonable jury to find for him on his blacklisting and retaliations towards Plaintiff, which has been admitted to. Plaintiff, therefore,demands a judgment as a matter of law granting this instant motion, with also a jury trial for the determination of damages.

Dated: March 11th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
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(505) 628 - 3541

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff Rockefeller and moves this Court for the issuance of an Order granting this instant Motion. Facts supporting the guilt of Defendant within this Motion are set forth in Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment filed herein.

Dated: March 1st, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

a. Within this instant Motion, there are NO new facts or averments which have not been fully briefed as of this day. Fact Nos. 1 through 3 below have been firmly established within the record of this case with impeccable evidence (from within the Federal Register). Due to what Plaintiff had experienced with his prior complaint (99-1059 PK/KBM), Plaintiff knew that it was necessary to establish facts and have all of his aversions fully briefed before attempting this Motion. For example, Plaintiff had specifically explained what is detailed within **Fact No. 1** below (**Unsafe Shipping Cask, Model RH-72B**), and had attempted to include **Defendant's Record of Decision ("ROD") concerning "Safe Shipping Containers"** for Transportation of Nuclear Waste as supporting

evidence of Defendant's pretext for Plaintiff's removal from federal service for his putative "poor performance" (doc. 58 at 5). The previous Court had improperly excluded Defendant's ROD, with a total of 748 pages of Plaintiff's evidence, as inadmissible. Plaintiff found this to be a shocking and blatant violation of his Fifth Amendment right of Due Process (**emphasis added**). This is why Plaintiff had attempted to establish his self-authenticated evidence into the record of this case with his Motion for such filed 9/26/01 (doc.20) (henceforth "First Evidence Motion").

b. On 2/2/02 Plaintiff served a Request for Admissions of the Authenticity of Evidence and Judicial Notice of Adjudicative Facts (henceforth "Notice") for evidence within Plaintiff's Binder of Self-Authenticated Evidence (henceforth "Binder"). As described within the Notice,two exhibits beneath Tabs 6 and 10 of the Binder ("Exhibit CX-18" and "Exhibit Destruct") are noted within the Federal Register and are required to be judicially noticed. See Notice at 3 and 44 U.S.C. § 1507. Fact Nos. 1 through 3 below are established from Exhibits CX-18 and Destruct.

II. ESTABLISHED ADJUDICATIVE FACTS

a. Fact No. 1: Pretext is clearly demonstrated by Exhibit CX-18 (Defendant's ROD described above) beyond any shadow of a doubt as to the reason why Plaintiff was removed from federal service on 12/10/97. As described within Plaintiff's First Evidence Motion at 4 the following is noted:

"15.Tab 6: "Exhibit CX-18" - this is a

1/23/98 Record of Decision ("ROD") made by Defendant of **Safe** "Transportation of Transuranic Waste to the Waste Isolation Pilot Plant" ("WIPP"). Plaintiff was removed from federal service only several weeks prior to Defendant's ROD. Plaintiff had reported a **design failure** of one of the two nuclear waste shipping casks (Model RH-72B), within this ROD, which results in a **faulty Radioactive Containment Seal** of the cask. This is evidence of why Plaintiff had to be fired so that Defendant could announce their ROD. Again, here is strong evidence which establishes a *prima facie* case of Plaintiff's against Defendant."

Causation is clearly established between Plaintiff's removal on 12/10/97 and Defendant's ROD issued on 1/23/98 with only six weeks between the two actions. **Compare** *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994) (one and one-half month period between protected activity and adverse action by itself, establish causation) **with** *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (three month period, standing alone, is insufficient to establish causation). This averment of pretext was made by Plaintiff for the first time back within his prior suit (99-1059 PK/KBM, doc 58 at 5) on 10/17/00, again within his First Evidence Motion on 9/26/01 as described above, and yet **again** for the third time within Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Compel at 3, 4 served on 2/2/02. On **three occasions** now

Defendant has refused to respond to this averment and its impeccable factual evidence. Fed.R.Civ.P. 8(d) requires that: "Averments in a pleading to which a response is required, . . ., are admitted when not denied in the responsive pleading." This Fact No. 1now solidly establishes that Defendant HAS conducted severe retaliations against Plaintiff for his objecting to Defendant's disregard for worker and public safety. The foundation or *prima facie* case is formed here for Defendant's initial and continuing retaliations against Plaintiff.

In addition, Defendant also makes knowingly false representations concerning this averment. Defendant claimed that: "Plaintiff fails, however, to explain how the correspondence concerning the shipping casks . . . is even remotely related to the claims in this suit . . ." See Response to Plaintiff's Motion to Compel at 4, 5 filed on 1/24/02. It is detailed above how Plaintiff did NOT (**on three occasions**) "fail" to "explain" how "the correspondence concerning the shipping casks" is very "related to the claims in this suit." This establishes Defendant's guilt even substantially further.

b. Fact No. 2: Defendant has admitted within Exhibit Destruct to the **destruction of "discoverable" evidence of a blacklisting nature** about Plaintiff prior to his 3/98 hearing with the Merit Systems Protection Board ("MSPB"). This averment of Plaintiff is related to a Freedom of Information Act ("FOIA") request which he made concerning Defendant's alleged complaints from "coworkers" where Plaintiff was told by Defendant on 7/6/97 that he was somehow "threatening their personal safety". Of primary importance to

this case, is that a court and jury are entitled to presume that when a party destroys evidence prior to litigation, that the evidence would be unfavorable to that party. See *Akiona v. U.S.*, 938 F.2d 158 (C.A.9 (Hawaii) 1991); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (C.A.7 (Ill) 1987); *Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874 (C.A.Fed. (Ind.) 1986); *Coates v. Johnson & Johnson*, 756 F.2d 524 (C.A.7 (Ill.) 1985).

To escape from supplying Plaintiff with this requested evidence, Defendant made several knowingly false claims within the Response to Plaintiff's First Request for the Production of Documents dated 12/28/01 (henceforth "12/01 Response"). Defendant made the clearly bogus claim that: ". . .it is unclear what documents Plaintiff is seeking." See 12/01 Response at 1 Plaintiff thoroughly dispelled Defendant's claim above within the Motion to Compel's Memorandum at 1, 2 served on 1/7/02. In Defendant's Response to Plaintiff's Motion to Compel (henceforth "1/02 Response") filed on 1/24/02, additional knowingly false representations are made. Defendant claims that Plaintiff is "precluded from obtaining the documents through discovery." See 1/02 Response at 3, 4. This representation is false. Defendant's attorney O'Dowd admitted that these documents are discoverable. Exhibit Destruct at document 26 (Record of Conversation dated 11/19/97) notes: "O'Dowd believes these two memos would be discoverable under 5 CFR 1201 in their entirety, . . ." This is why O'Dowd later requested that this evidence be destroyed. See Binder Tab 10, Exhibit Destruct - doc 30 dated 12/31/97.

Defendant makes one knowingly false claim after another to avoid supplying Plaintiff with

incriminating evidence, while failing to address the aversion made by Plaintiff that the claim within the "two memos" is false. Fed.R.Civ.P 8(d) **again** requires that Defendant has admitted to Plaintiff's averment by failing to deny it. In addition, **Defendant changes his accusation** from Plaintiff "threatening the personal safety" of "coworkers" to stating that Plaintiff ". . . is not threatening physical harm, but is verbally harassing people . . .". See Binder Tab 10, Exhibit Destruct - doc 26 dated 11/19/97. Defendant has admitted to making false representations about Plaintiff of a blacklisting nature. It is therefore **fact** that Defendant HAS engaged in blacklisting activities towards Plaintiff and HAS destroyed evidence of such (**emphasis added**).

c. Fact No. 3: Defendant has posted on the Internet **false information about Plaintiff of a blacklisting nature** from 2/6/98 to the present day for any inquisitive employer to see. This information is STILL available on the Internet as of 2/28/02. All one has to do to access this blacklisting type information about Plaintiff is to do a search for his name with an Internet Search Engine and this information becomes instantly available. In addition, the excerpt of the Federal Register, which Plaintiff has included within the Binder Tab 10, provides direction to three different sources where this information can be obtained about Plaintiff. E.g.: www.oha.doe.gov. What is found at this website is a four page Decision and Order of Defendant, Case No.VFA-0351 concerning Plaintiff's FOIA request. On page two of four it is stated: "In fact, AOO has informed us that Appellant [Plaintiff] has already engaged in

extreme verbal harassment of co-workers . . . see Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd (November 19, 1997)," **See Exhibit I**

The information quoted above that Defendant has posted about Plaintiff on the Internet is false, and it is of the result of Defendant's ex parte communication of "November 19, 1997". See the captioned Original Complaint at 4 which states:

> "20. Contained within this D & O (VFA - 0351) is evidence of *ex parte* communications made between Defendant's AOO and OHA with **knowingly false representations made about Plaintiff of a very public Blacklisting nature posted on the INTERNET.**
>
> 21. The Blacklisting comments, made by Mr. Ron O'Dowd of Defendant's AOO, are **still** available on the INTERNET to the very day of this instant Complaint for any inquisitive employer to see (emphasis added)."

Fed.R.Civ.P. 8(d) applies **again** here. Defendant does not respond or deny the averment above and therefore admits to this very public blacklisting of Plaintiff with a knowingly false representation.

III. CONCLUSION

Plaintiff has very solidly established, within Fact Nos. 1 through 3 above, that Defendant has engaged in blacklisting activities against him from

11/97 to the present day. By fact and law, Defendant has admitted to this without any doubt. The Supreme Court has ruled within *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, 624 (1944) that: ". . . a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve, and which would require a directed verdict for the moving party." See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). All that has been presented above has been firmly established as fact and has been fully briefed **prior** to this instant Motion. This Motion is therefore complete and ready for judgment upon filing.

Defendant was contacted and opposes this Motion.

PRAYER FOR RELIEF

Plaintiff prays that this Court will afford him his Fifth Amendment right of "equal protection of the laws" from the discrimination by Defendant by granting this instant Motion and issuing an Order noting the guilt of Defendant, and for proceeding before a Jury Trial for the determination of damages. Justifications for granting this Motion for Partial Summary Judgment have been thoroughly detailed above.

Dated: March 1st, 2002

Respectfully submitted,
s/Tod N. Rockefeller
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